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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

SOCIETE NATIONALE INDUSTRIELLE AEROSPATIALE AND SOCIETE DE CONSTRUCTION D'AVIONS DE TOURISM,
Petitioners,

v.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IOWA,
Respondent.

(DENNIS JONES, JOHN AND ROSA GEORGE,
Real Parties in Interest)

REPLY BRIEF IN SUPPORT OF PETITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Treaties

Other Authorities

No. 85-1695

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REPLY BRIEF IN SUPPORT OF PETITION

The Court has acknowledged the importance of the questions presented here by its grant of certiorari in *Messerschmitt Bolkow Blohm, GmbH v. Walker,* 54 U.S.L.W. 3686-87 (U.S. April 22, 1986) (No. 85-99). Respondents concede that *Messerschmitt* raises similar issues to this case but assert, without explanation, that these issues are somehow distinguishable. Both this case and *Messerschmitt* present the question of whether U.S. courts are free to disregard the procedures of the Hague Evidence Convention where discovery of evidence located abroad is sought from a foreign national over whom the court has personal jurisdiction. The only factors which distinguish this case from *Messerschmitt* are additional reasons why certiorari should be granted or, alter-

natively, why the Court should defer action on this case until after *Messerschmitt* is decided. Respondents' arguments to the contrary show a fundamental misunderstanding of the Hague Evidence Convention and the principle of international comity.[1]

I

THE ONLY FACTORS WHICH DISTINGUISH THIS CASE FROM *MESSERSCHMITT* ARE ADDITIONAL REASONS WHY CERTIORARI SHOULD BE GRANTED

The decision below holds that the Hague Evidence Convention does not apply to the discovery sought in this case. It supports that conclusion by quoting from and citing to the Fifth Circuit's decisions in *Messerschmitt* and *In re Anschuetz & Co., GmbH*, 754 F.2d 602 (5th Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3084 (U.S. Aug. 13, 1985) (No. 85-98). *See* Pet. App. A at 4a-5a. At a minimum, the Court's decision to review *Messerschmitt* requires reconsideration of the decision below, which follows and applies *Messerschmitt*. There are, however, certain factors which distinguish this case from *Messerschmitt* and which the Court should consider as additional reasons to hear this case in conjunction with or in addition to *Messerschmitt*.

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[1] Respondents also misread Supreme Court Rule 18. They argue that, because the petition concerns review of a district court's interlocutory order, it should be heard only if it presents a question "of such imperative public importance as to justify the deviation from normal appellate practice." Brief in Opposition at 7. Rule 18 applies only to the question of whether the Court should grant certiorari to review a case *before* a court of appeals has entered any order or judgment. 12 J. MOORE, H. BENDIX, B. RINGLE, MOORE'S FEDERAL PRACTICE ¶ 434.01 (2d ed. 1982). *See, e.g.*, U.S. v. Nixon, 418 U.S. 683 (1974); New Haven Inclusion Cases, 399 U.S. 392 (1969). Here the court of appeals has reached a final decision on the merits of the matter before it. Moreover, under 28 U.S.C. § 1254, the Court has power to review by certiorari federal appellate decisions which rule on interlocutory orders, and it has often done so where, as here, the standards of Rule 17 have been satisfied. *See, e.g., Messerschmitt*; Hughes Tool Co. v. Trans World Airlines, 409 U.S. 363 (1973); Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251 (1916).

The first such factor is that disclosure of the documents and information sought by respondents will violate French Penal Code Law No. 80-538 (the "French Blocking Statute"). There is no blocking statute at issue in *Messerschmitt*. Such statutes have a special significance in performing the comity analysis which the Solicitor General has commended to the Court. The Solicitor General has told the Court, first, that "courts should refrain, when feasible, from ordering a party to perform acts that would violate the laws or clearly articulated policies of a foreign government."[2] Second, the Solicitor General has said that the existence of a blocking statute might be considered "as a measure of the foreign nation's depth of resolve concerning its 'judicial sovereignty.' "[3]

A second important factor which distinguishes this case from *Messerschmitt* is that the decision below makes no pretext of engaging in a comity analysis as to whether the procedures of the Hague Evidence Convention should be followed. The decision below states categorically that the Convention *does not apply* to discovery of evidence and information located abroad from a foreign national over whom the court has personal jurisdiction so long as the physical production of the documents and information occurs in the United States. Pet. App. at 5a. Thus, even were the Court to adopt the Solicitor General's view that the *Messerschmitt* court engaged in an adequate comity analysis and reached an "essentially correct" result,[4] the decision below would not be vindicated.

Finally, unlike *Messerschmitt*, this case has not yet gone to trial. Although counsel for *Messerschmitt* has informed the Court that the Hague Evidence Convention question there presented has not become moot because appeals are being taken, there remains some risk that mootness will occur before the Court decides *Messerschmitt*. Such risk is remote here.

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[2] Brief for United States as Amicus Curiae at 11, *Anschuetz* and *Messerschmitt*.

[3] *Id.* at 15.

[4] *Id.* at 6.

II

RESPONDENTS MISSTATE THE QUESTION PRESENTED AS ONE OF JUDICIAL POWER RATHER THAN AS ONE OF INTERNATIONAL COMITY

Respondents and the decision below appear to believe that the Convention can be circumvented whenever a court has personal jurisdiction over a foreign national by ordering that the physical production of the documents and information located abroad take place on American soil. This position creates a distinction not found in the treaty and confuses in personam jurisdiction with the exercise of the power to compel.

Respondents assert repeatedly that the Hague Evidence Convention does not apply at all to the discovery requests here in issue. While the decision below indeed so held, this is contrary to the weight of authority, including many of the decisions on which respondents and the court below rely.[5]

The Hague Evidence Convention exists to protect the judicial sovereignty of its signators and to foster mutual judicial cooperation in civil or commercial matters.[6] By its terms, the Convention applies equally to the discovery of evidence abroad from litigants and non-litigants. Nowhere in the language of the Convention is a distinction drawn between parties and non-parties. In its statements to the Court, the Solicitor General has explicitly rejected such a distinction:

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[5] *See, e.g.*, Work v. Bier, 106 F.R.D. 45, 56 (D.D.C. 1985); Slauenwhite v. Bekum Maschinfabriken GmbH, 104 F.R.D. 616, 618-19 (D. Mass. 1985); Graco, Inc. v. Kremlin, Inc., 101 F.R.D. 503, 520-24 (N.D. Ill. 1984); International Society for Krishna Consciousness, Inc. v. Lee, 105 F.R.D. 435, 443-44 (S.D.N.Y. 1984); Lasky v. Continental Products Corp., 569 F. Supp. 1227, 1229 (E.D. Pa. 1983).

[6] "The foundation of the Convention is to avoid international friction where a domestic state court orders civil discovery to be conducted within the territory of a civil law nation that views such unilateral conduct as an intrusion upon its judicial sovereignty." Pierburg GmbH & Co. KG v. Superior Court, 137 Cal. App. 3d 238, 244, 186 Cal. Rptr. 876 (1982).

> The fact that a state court has personal jurisdiction over a private party . . . does not mean that treaty limits on proceedings for the taking of evidence abroad somehow do not apply to discovery orders addressed to such parties. *The Evidence Convention protects the judicial sovereignty of the country in which evidence is taken, not the interests of the parties to the suit. Accordingly, its strictures apply regardless of the existence of personal jurisdiction.* [Brief for United States as Amicus Curiae at 7 n.3, *Volkswagenwerk A.G. v. Falzon*, 465 U.S. 1014 (1984) *(appeal dismissed)* (emphasis supplied).]

Respondents consistently misstate the question presented here as one of judicial power.[7] No one denies the jurisdiction of the district court to order petitioners, as parties to the action before it, to give discovery of evidence in France. Rather, the issue is whether, "in the exercise of judicial restraint based on international comity,"[8] the court should require respondents to use the Convention's procedures. As one commentator has explained:

> The fact that the witness, documents, or person in control of documents or other evidence located abroad is subject to the jurisdiction of the court does not necessarily mean that the American court should apply the ordinary discovery practices of the forum.
>
> * * *
>
> The existence of jurisdiction is relative rather than absolute. The notion that jurisdiction to command appearance before the court "domesticates" the witness or party for all purposes relevant to the litigation is fallacious. The court should not ignore the foreign nationality or locus of the

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[7] Respondents state the question as:

> [M]ay a district court order a foreign defendant over whom it has personal jurisdiction to respond to interrogatories and requests for production in the United States, even if the defendant must resort to sources of information located abroad? [Brief in Opposition at 10.]

[8] Volkswagenwerk A.G. v. Superior Court, 123 Cal. App. 3d 840, 859, 176 Cal. Rptr. 874 (1981).

witness or evidence. [Oxman, *The Choice Between Direct Discovery and Other Means of Obtaining Evidence Abroad: The Impact of the Hague Evidence Convention*, 37 U. Miami L. Rev. 733, 739-41 (1983).]

Ordering documents to be produced on American soil does not make the issue disappear. Civil law countries regard the taking of evidence as a judicial function rather than as an act of the parties; when evidence is taken without the participation of the country where the evidence is located, its judicial sovereignty is considered violated. *See* Edwards, *Taking of Evidence Abroad in Civil or Commercial Matters*, 18 Int'l & Comp. L.Q. 646, 647 (1969). While the degree of intrusion on foreign judicial sovereignty would be an appropriate factor to consider in a comity analysis,[9] respondents and the decision below improperly employ a geographic fiction as a ground for dispensing with a comity analysis entirely.

III

RESPONDENTS' CONJECTURE THAT USE OF THE CONVENTION WOULD PROVE FUTILE IS NOT A BASIS FOR DISPENSING WITH A COMITY ANALYSIS

Respondents, like the decision below, do not squarely address the question of whether international comity requires adherence to the procedures of the Hague Evidence Convention here, at least in the first instance. Instead, respondents attempt to stand the question on its head by challenging petitioners to prove that use of the Convention's procedures will be effective.

Respondents have made no attempt to employ the Convention's procedures. As several courts have noted, until a party makes proper application for the evidence located abroad through a letter of request, we cannot know what discovery it can obtain.[10]

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[9] *See generally* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965).

[10] *See, e.g.*, Gebr. Eickhoff Maschinfabrik und Eisengieberei v. Starcher, 328 S.E. 2d 492, 502 (W. Va. 1985); Vincent v. Ateliers de la Motobecane, S.A., 193 N.J. Super. 716, 475 A.2d 686, 690 (1984); Lasky v. Continental Products Corp., 569 F. Supp. at 1229.

Nonetheless, respondents' arguments that use of the Convention's procedures would be futile are not well founded.

Respondents point first to France's declaration under article 23 of the Convention, reserving its right not to execute letters of request "issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries." The Court should not assume that countries which have exercised their right under article 23 will fail to cooperate in providing requested evidence contained in documents. To the contrary, it appears that this reservation was only intended to prevent discovery of a "fishing nature."[11] According to the Special Commission on the Convention's operation, "[r]efusal to execute turns out to be very infrequent in practice."[12] Moreover, the Convention narrowly circumscribes those situations in which the execution of a letter of request may be refused. Art. 12, Pet. App. at 30a. It also expressly contemplates good faith attempts by foreign courts to implement any legitimate discovery request. Art. 9, Pet. App. at 29a.[13] In matters similar to the present one, the French Ministry of Foreign Affairs has advised foreign litigants to seek information of a technical or commercial nature through the Convention's procedures.[14]

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[11] Report of the United States Delegation to the Special Commission on the Operation of the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, *reprinted in* 17 Int'l Legal Materials 1417, 1421 (1978).

[12] Report on the Work of the Special Commission on the Operation of the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, *reprinted in* 17 Int'l Legal Materials 1425, 1431 (1978).

[13] *See* Philadelphia Gear Corp. v. American Pfauter Corp., 100 F.R.D. 58, 61 (E.D. Pa. 1983); Volkswagenwerk A.G. v. Superior Court, 123 Cal.App.3d at 858.

[14] *See* Vincent v. Ateliers de la Motobecane, S.A., 475 A.2d at 689-90.

Respondents also mention that France has declined to make a declaration under article 18 that it will use compulsion to assist diplomatic officers to take evidence in France. Article 18, however, is concerned with compulsion for the taking of oral testimony before an official of the requesting State and has no relevance to the written discovery requests here in issue.

Nor does France's enactment of a blocking statute indicate, as respondents claim, an "official policy" to bar discovery from French litigants in United States courts. *See* Brief in Opposition at 14. On the contrary, because the French Blocking Statute contemplates criminal penalties only for the disclosure of information not made through the procedures of the Hague Evidence Convention, it expresses a strong French governmental policy in favor of the Convention's use. This clearly articulated policy is an important comity consideration *favoring* adherence to the Convention's procedures.

The heart of respondents' objection to use of Hague Evidence Convention procedures is that France "will use its own unreviewable discretion to decide what, when, and where litigants will be able to obtain information necessary to prepare their case." Brief in Opposition at 14. While it cannot be expected that the French government would exercise no control over discovery on its soil, use of the Convention does not require the American court to surrender its jurisdiction over the foreign national. A party dissatisfied with the fruits of discovery conducted through the Convention can return to the trial court for further assistance. The court would then be in a position to weigh the interest of comity against the needs of the particular litigant on the basis of a record instead of on the basis of conjecture.[15]

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[15] Respondents and the decision below suggest that allowing the trial court to order further discovery if requests made through the Convention's procedures are not honored would be "the greatest insult to the civil law nation's sovereignty". Pet. App. at 7a; Brief in Opposition at 15. This argument misunderstands the nature of comity. International comity is concerned with avoiding conflicts with the sovereign interests of foreign nations where possible, not with "mere courtesy and good will." Hilton v. Guyot, 159 U.S. 113, 163-64 (1895).

Finally, respondents claim that the petition asks the Court to issue an "advisory opinion" on the French Blocking Statute.[16] This is false. The questions presented concern the applicability and use of the Hague Evidence Convention. They have been ruled upon by two lower courts here as well as by numerous other courts. Respondents' specious "ripeness" argument treats the question of deference to the French Blocking Statute in isolation from the question of whether the Convention's procedures should be followed, and not as a factor in a comity analysis. It is only in this latter context that any issue concerning the French Blocking Statute has been presented to the Court.

CONCLUSION

The decision below, like *Messerschmitt,* is representative of a line of cases construing the Hague Evidence Convention which, if permitted to stand, will relegate the Convention to disuse. Certiorari should be granted to address important questions of international comity which the decision below ignores.

Respectfully submitted,

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[16] Brief in Opposition at 15.